

TENNESSEE GENERAL ASSEMBLY  
FISCAL REVIEW COMMITTEE



FISCAL NOTE

HB 1694 - SB 1682

February 18, 2016

**SUMMARY OF BILL:** Requires that a motion picture, film, or video count as 51 images for purposes of sexual exploitation of a minor under Tenn. Code Ann. § 39-17-1003.

Creates a new Class E felony for sexual contact with a minor if the minor is under 13 years of age.

Expressly makes aggravated sexual battery a lesser included offense of rape of a child.

**ESTIMATED FISCAL IMPACT:**

**Increase State Expenditures – \$415,400/Incarceration\***

*Assumptions Relative to Sexual Exploitation of a Minor*

- Sexual exploitation of a minor is punishable as a Class D felony, Class C felony, or a Class B felony depending upon how many “images” are in the defendant’s possession. The statute, Tenn. Code Ann. § 39-17-1003, does not address the treatment of videos depicting minors engaged in sexual activity or simulated sexual activity.
- The proposed legislation would require videos to count as 51 images, which would put the offense in the Class C felony range (50 – 100 images). Rather than the Class D range (less than 50 images).
- Statistics from the Department of Correction (DOC) show a 10-year average of annual admissions for sexual exploitation as follows:
  - Class D felony (less than 50 images) – 9.9
  - Class C felony (50 – 100 images) – 6.4
  - Class B felony (more than 100 images) – 5.9
- The proposed legislation would result in more Class C and Class B felony admissions, as it would be easier to prove a defendant possesses either 50 – 100 images, or more than 100 images.
- It is assumed that the proposed legislation will result in four admissions per year being prosecuted as Class C felonies rather than Class D felonies, and three admissions per year being prosecuted as Class B felonies rather than Class C felonies.
- According to the U.S. Census Bureau, population growth in Tennessee has been 1.12 percent per year for the past 10 years, yielding a projected compound population growth of 11.78 percent over the next 10 years. Population growth will not affect the fiscal

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impact of this legislation.

- According to the DOC, the average operating cost per offender per day for calendar year 2016 is \$67.73.
- The average time served for a Class C felony is 3.22 years, and the average time served for a Class D felony is 2.32 years. The proposed legislation will result in four offenders serving an additional 0.9 years ( $3.22 - 2.32$ ) for being convicted of a Class C felony for sexual exploitation of a minor rather than a Class D felony.
- According to the DOC, 33.3 percent of offenders will re-offend within one year of their release. A recidivism discount of 33.3 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this bill. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ( $4 \text{ offenders} \times .333 = 1.33 \text{ offenders}$ ).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on three offenders [ $4 \text{ offenders} - 1 \text{ (recidivism discount)}$ ] serving an additional 0.9 years (328.73 days) for a total of \$22,264.88 ( $\$67.73 \times 328.73 \text{ days}$ ). The cost for three offenders is \$66,794.65 ( $\$22,264.88 \times 3$ ).
- The average time served for a Class B felony is 6.59 years, and the average time served for a Class C felony is 3.22 years. The proposed legislation will result in three offenders serving an additional 3.37 years ( $6.59 - 3.22$ ) for being convicted of a Class B felony for sexual exploitation of a minor rather than a Class C felony.
- According to the DOC, 43.7 percent of offenders will re-offend within two years of their release. A recidivism discount of 43.7 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this bill. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ( $3 \text{ offenders} \times .437 = 1.31 \text{ offenders}$ ).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on two offenders [ $3 \text{ offenders} - 1 \text{ (recidivism discount)}$ ] serving an additional 3.37 years (1,230.89 days) for a total of \$83,368.18 ( $\$67.73 \times 1,230.89 \text{ days}$ ). The cost for two offenders is \$166,736.36 ( $\$83,368.18 \times 2$ ).

#### *Assumptions Relative to Sexual Contact with a Minor*

- Tennessee Code Annotated § 39-13-509 makes it an offense to engage in unlawful sexual contact with a minor by an authority figure when the minor is at least 13 but less than 18 years of age. Sexual contact by an authority figure is a Class A misdemeanor.
- Tennessee Code Annotated § 39-13-509 defines “sexual contact” as the intentional touching or kissing of a minor’s lips with the defendant’s lips if such touching can be reasonably construed as being for the purpose of sexual arousal or gratification.
- This definition specifically applies to Tennessee Code Annotated § 39-13-509 rather than the definition of “sexual contact” found in Tennessee Code Annotated § 39-13-501.
- Tennessee Code Annotated § 39-13-501 defines “sexual contact” as:  
[T]he intentional touching of the victim’s, the defendant’s, or any other person’s intimate parts, or the intentional touching of the clothing covering the immediate area of the victim’s, the defendant’s, or any other person’s intimate parts, if that

intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.

- Tenn. Code Ann. § 39-13-501 defines “intimate parts” as “semen, vaginal fluid, the primary genital area, groin, inner thigh, buttock or breast of a human being.”
- Under current law, an authority figure that kisses or touches the lips of a minor under the age of 13 has committed neither sexual contact with a minor, nor aggravated sexual battery, because sexual contact with a minor only applies to minors 13 to 18 years of age and aggravated sexual battery requires sexual contact with a person’s “intimate parts” as defined in Tennessee Code Annotated § 39-13-501.
- The proposed legislation creates a new Class E felony for sexual contact, as defined in T.C.A. § 39-13-509, by an authority figure if the minor is less than 13 years of age.
- Statistics from the Administrative Office of the Courts (AOC) show an average of 1.5 convictions per year for sexual contact with a minor (between 13 and 18 years of age) by an authority figure.
- These statistics represent convictions at the state court level—circuit or criminal court. It is assumed that only 10 percent of misdemeanor convictions are at the state court level; the rest are disposed of in general sessions court. It is assumed that there are a total of 15 convictions (1.5 x 10) per year for violations of Tenn. Code Ann. § 39-13-509.
- It is assumed that the proposed legislation will result in five new Class E felony admissions each year.
- The average time served for a Class E felony is 1.47 years (536.92 days).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on five offenders serving 1.47 years (536.92 days) for a total of \$36,365.59 (\$67.73 x 536.92 days). The cost for five offenders is \$181,827.95 (\$36,365.59 x 5).

#### *Assumptions Relative to Lesser Included Offenses*

- In 1999, the Tennessee Supreme Court established a three-prong test for determining whether an offense is a lesser included offense. *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999).
- Ten years later, the General Assembly enacted Chapter 408 of the 2009 Tennessee Public Acts (“Public Chapter 408”), which codified a test for determining when an offense is a lesser included offense. Public Chapter 408 added two new subsections to Tenn. Code Ann. § 40-18-110. Subsection (f) adopted two prongs of the three-prong *Burns* test, and subsection (g) specifically listed certain lesser included offenses. The lesser included offenses listed in subsection (g) were intended to clarify what was current practice. *See, Hearing on S.B. 783*, 106<sup>th</sup> General Assembly, Senate Sess. (Tenn. June 8, 2009).
- A recent case heard by the Tennessee Criminal Court of Appeals addressed whether aggravated sexual battery was a lesser included offense of rape of a child. *State v. John J. Ortega, Jr.*, No. M2014-01042-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 295, (Tenn. Crim. App. Apr. 23, 2015).
- The Criminal Court of Appeals reviewed the procedural history of *Burns* and Public Chapter 408. *Id.* at 21-24. The court noted that aggravated sexual battery would be a lesser included offense of rape of a child under the *Burns* test, *Id.* at 22, but was not a lesser included offense under Public Chapter 408, *Id.* at 34-35. Public Chapter 408 did

not adopt the prong of the *Burns* test that would make aggravated sexual battery a lesser included of rape of a child. *Id.* at 22-24.

- Subsection (g) specifically provides that aggravated sexual battery is a lesser included offense of aggravated rape, but does not mention rape of a child. Tenn. Code Ann. § 40-18-110(g)(3).
- The proposed legislation specifically makes aggravated sexual battery a lesser included offense of rape of a child by adding “rape of a child” to § 40-18-110(g)(3).
- The Court of Criminal Appeals also noted that since the enactment of Public Chapter 408, the court had upheld seven convictions for aggravated sexual battery as a lesser included of rape of a child. *Ortega*, 2015 Tenn. Crim. App. LEXIS 295, at 30 n.5. Those cases, however, did not directly raise the issue that aggravated sexual battery was not a lesser included offense of rape of a child. *Id.*
- Though aggravated sexual battery is not a lesser included offense of rape of a child, general practice up to time of the *Ortega* case treated aggravated sexual battery as a lesser included offense of rape of a child. It is assumed that codifying this practice in § 40-18-110(g)(3), as the proposed legislation seeks to do, will not significantly impact incarceration costs.

*Assumptions Relative to District Attorneys, Public Defenders, and the Courts*

- The AOC reports that it can handle any impact within its existing resources.
- The District Attorneys General Conference reports that the proposed legislation will not significantly impact the conference.
- The District Public Defenders Conference (DPDC) reports that the bill will impact their felony caseload. The bill only creates a few new felony cases per year. It is assumed that the DPDC can accommodate the impact within its existing resources.

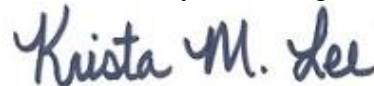
*Assumption Relative to Total Increase of Incarceration Costs*

- The total recurring increase in state incarceration costs is estimated to be \$415,358.96 (\$66,794.65 + \$166,736.36 + \$181,827.95).

*\*Tennessee Code Annotated § 9-4-210 requires an appropriation from recurring revenues for the estimated operation cost of any law enacted after July 1, 1986 that results in a net increase in periods of imprisonment in state facilities. The amount appropriated shall be based upon the highest cost of the next 10 years.*

**CERTIFICATION:**

The information contained herein is true and correct to the best of my knowledge.



Krista M. Lee, Executive Director

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